Case No. 82-2036

Office-Supreme Court, U.S.
FILED
JUN 13 19
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Ralph Roger Bergman,

Petitioner,

V.

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARY TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Frederic W. Schwartz, Jr.
1101 Connecticut Ave.N.W.
Suite 409
Washington, D.C. 20036
Tel:(202) 463-0880
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether a Federal Employee can be removed persuant to Reduction-In-Force, (RIF), if the agency for which he works fails to comply with the statutes and regulations governing that procedure. All parties to the case below are named in the caption of this petition.

TABLE OF CONTENTS

	Page
Question Presented for Review.....	i
Table of Authorities.....	1
Statutory and Regulatory Provisions Invoked.....	1
Jurisdiction.....	2
Opinions Below.....	2
Statement Of The Case.....	3
Argument for Allowance of the Writ.....	5

APPENDIX SECTION:

Appendix A. The Opinion of the United States Court of Claims, issued June 16, 1982.....	A-1
Appendix B. The Opinion of the United States Court of Appeals for the Federal Circuit, issued January 10, 1983.....	B-1
Appendix C. United States Court of Appeals for the Federal Circuit denial for reconsideration and petition for hearing en-banc, issued March 17, 1983.....	C-1
Appendix D. Statutory and Regulatory Provisions Invoked.....	D-1
5 U.S.C. SS 3502.....	D-1
5 C.F.R. Chapter 351.....	D-1
28 U.S.C. SS 1254.....	D-5

TABLE OF AUTHORITIES

BRANNEN v. ELDER, 341 U.S. 277, 71 S.Ct. 1012, 91 L.Ed. 1377 (1951);

HILTON v. SULLIVAN, 334 U.S. 323, 68 S.Ct. 1020; 92 L.Ed. 1416 (1947);

STATUTORY AND REGULATORY PROVISIONS INVOKED.

The relevant statutory and regulatory provisions invoked appear in Appendix D.

STATUTES CITED:

United States Code, Title 5, Section 3502 in effect at the time of the action complained off is shown in Appendix D, p. D-1.

REGULATIONS CITED:

Code Of Federal Regulations, Title 5, in effect at the time of the action complained off is shown in Appendix D, p. D-1 to D-5.

Title 5, section 351 Reduction In Force:

SS 351.202	Use of Regulation,
SS 351.303	Definitions,
SS 351.401	Determining Retention Standing,
SS 351.402	Competitive Area,
SS 351.403	Competitive Level,
SS 351.404	Retention Register,
SS 351.501	Tenure Groups and Sub groups--Competitive Service,
SS 351.505	Records
SS 351.506	Effective Date Of Retention Standing
SS 351.601	General,
SS 351.602	Order of release from Competitive Level,

JURISDICTION

The Judgement of the United States Court of Appeals for the Federal Circuit affirming the judgement of the United States Court of Claims was entered on January 10, 1983. The Order of the Court of Appeals for the Federal Circuit denying Appellant's Petition for Rehearing was entered March 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.(see Appendix D)

OPINIONS BELOW

The Opinion of the United States Court of Claims, Civil Matter 84-78, issued June 16, 1982, is shown in Appendix A.

The Opinion of the United States Court of Appeals for the Federal Circuit, issued January 10, 1983, is shown in Appendix B.

United States Court of Appeals for the Federal Circuit denial for reconsideration and petition for hearing en banc, issued March 17, 1983, is shown in Appendix C.

STATEMENT OF THE CASE

This case involves the question whether a Federal Agency, which (1) failed to provide a current and accurate retention register and (2) failed to provide an employee the current competitive standing of the competing employees in petitioner's competitive area, both of which are required by statute and regulation prior to a Reduction-In-Force (RIF), can nonetheless remove the employee under RIF procedures.

The matter arose on August 31, 1973, when the petitioner was removed from his position with the United States Department of Commerce pursuant to a RIF. He was the sole employee to be removed at that time, and the RIF applied only to him.

Petitioner filed a verbal and a written request with his agency's personnel office requesting inspection, as required by statute and regulation, of a current competitive retention register for his competitive level and the associated records

which showed the current competitive standing of the competing employees in the two agency divisions that comprised appellant's competitive area. The agency denied this request,(FOF 44) and instead supplied petitioner a retention register and associated records current to April 1973 with certain handwritten annotations.

After exhausting his administrative remedies the petitioner brought an action in the United States Court of Claims. The Court of Claims held, inter alia, that an accurate retention register had not been provided and that the retention records of competing employees were incomplete.(FOF 42, 46; p.A-18, p.A-19, p.A-20 of Appendix A). Nonetheless, the Court of Claims adopted the position of the previous administrative appeals bodies that the petitioner had failed to prove that his right would have been greater if an accurate retention register and related records had been provided (FOF 53, 87; p.A-18 Appendix A) petitioner was therefore not

entitled to relief. The Court of Appeals for the Federal Circuit sustained this position.

REASONS FOR ALLOWING THE WRIT:

The decision of the Court of Claims, as affirmed by the Court of Appeals, essentially strikes down the provision of 5.U.S.C. 3502 and the regulations promulgated in furtherance of that statutory mandate. Both Courts found that the agency failed to provide the petitioner with an accurate retention register and related records indicating those employees in petitioner's competitive area which he was entitled to displace to avoid his own removal.

Yet, both Courts placed the burden of proof on the petitioner by requiring him to identify those positions which he was entitled to displace to avoid removal. The impossible position that the petitioner faced--being required on the one hand to identify those positions for which he was

eligible while being deprived of an accurate listing of those positions for which he might be eligible--is precisely the circumstance which the cited statutory and regulatory provisions were enacted to avoid.

This Court has made clear that RIF's are to be governed solely by the mandate of Congress and the regulations implementing this mandate. Hilton v.Sullivan, 334 U.S. 323, 68 S.Ct. 1020, 92 L.Ed. 1416 (1947); Brannan v. Elder, 341 U.S. 277, 71 S.Ct.1012; 91 L.Ed. 1377 (1951). Thus the decisions below are in clear conflict with the decisions of this Court. Further, to allow the decisions of the Court of Claims and the Court of Appeals for the Federal Circuit to stand, will empower Federal Agencies to ignore the critical mandates of the Congress and of the Office of Personnel Management unless an employee is able, in a serendipitious fashion, to determine the very information that statute and regulation requires to be given to him, but which the agency has

withheld.

CONCLUSION

The issue in this case is on that reaches the heart of the Congressionally-provided protection for Federal employees in a RIF proceeding. By placing the burden of proof on the employee rather than the agency in the face of a clear and critical violation of statute and regulations, the Courts below have placed an impossible and incomprehensible burden on the employee.

For the foregoing reasons, this petitioner prays that this Court will grant his motion for certiorary for the reasons cited above.

Respectfully submitted,

Frederic W. Schwartz, Jr.
1101 Connecticut Ave. N.W.
Washington D.C. 20036
(202) 463-0880

Attorney For The Petitioner.